

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THERESA BORRUSO

CASE NO. 88-00919

Debtor

APPEARANCES:

RANDY J. SCHAAL, ESQ.
Trustee
131 Sherrill Road
Sherrill, New York 13461

GUSTAVE J. DeTRAGLIA, ESQ.
Attorney for Debtor
1425 Genesee Street
Utica, New York 13501

JAMES F. SELBACH, ESQ.
Attorney for Debtor
505 Wilson Building
Syracuse, New York 13202

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter comes before the Court on the Trustee's objection to Debtor's claimed exemption of her interest in certain real property. The Trustee objects pursuant to §522(e) of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 & Supp. 1988) ("Code"), and Rule 4003(b) of the Bankruptcy Rules ("Bankr.R.").

A hearing on the Trustee's objection was held before the Court on November 29, 1988 with both the Trustee and the Debtor being given an opportunity to submit memoranda of law. Neither party has submitted any memoranda.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of this core proceeding by virtue of 28 U.S.C.A. §§1334(b) and 157(a), (b)(1), (2)(B) and (O) (West Supp. 1988). The following findings of fact and conclusions of law are governed by Bankr.R. 4003(b), 7052 and 9014.

FACTS

Debtor filed a voluntary petition pursuant to Chapter 7 of the Code on June 13, 1988 and listed in Schedule B-2, Real Property, as follows:

<u>Property Description</u>	<u>Interest</u>	<u>Value</u>
One Family Residence 1157 Conkling Ave. Utica, New York	Fee simple	\$50,000.00

In Schedule B-4, Property Claimed As Exempt, the following entry appeared:

<u>Type and Description of Property</u>	<u>Exempt Value</u>
Real One Family Residence, 1157 Conkling Ave., Utica, New York 13501	\$6,000.00

In Schedule A-2, Creditors Holding Security, Debtor provided the following:

<u>Creditor and Security</u>	<u>Basis</u>	<u>ValueClaim</u>
Beneficial Homeowners Services Corporation		

187 Genesee St.
 Utica, N.Y. 13503
 First mortgage on real property
 located at 1157 Conkling
 Ave., Utica, New York

\$50,000 \$36,000

Marine Midland
 508 Bleecker St.
 Utica, N.Y. 13501
 Second mortgage on same
 real property

\$50,000 \$ 8,000

The docket of this case indicates that an initial meeting of creditors was held pursuant to Code §341 on July 12, 1988 at the United States Courthouse, Utica, New York. It appears that the Debtor was present at this meeting and was examined by the Trustee, Randy J. Schaal, Esq.

On October 13, 1988, the Trustee filed and served his objections on the Debtor and Debtor's attorney pursuant to Code §522(e) and Rule 403(c) [sic]. See Trustee's Objections to Exemptions (Oct. 10, 1988) ("Trustee's Objection"). He indicated that the "valuation as provided in debtor's petition was inaccurate and the true value of the property should be \$70,000.00, having a value in excess of the homestead exemption." Id.

The Debtor served a Response to Trustee's Objections to Claimed Exemptions ("Response") in which she alleged that the Trustee had failed to file and serve his objection prior to August 12, 1988, the date by which such Trustee's Objection would have to be filed in order to comply with Bankr.R. 4003(b). The Debtor further alleged that the Trustee had not sought any extension of time from the Court to file the Objection.

In addition, Debtor claimed that her real property did in fact

have a fair market value of \$50,000.00 as of the date her petition was filed and the fact that it may have changed since the petition was filed is not a basis to challenge her exemptions.

A hearing on the Trustee's Objection was held before the Court on November 29, 1988 and the Trustee there alleged, upon information and belief, that the Debtor had entered into a contract to sell her real property for \$70,000.00 on July 23, 1988, approximately one month after she filed her petition, and that, in fact, the real property was a four-family residence, not a one-family residence as indicated in the petition.

Debtor did not dispute Trustee's contention that her property was a four-family dwelling, and further refers to an appraisal of the property which was given to the Trustee apparently prior to the filing of the Trustee's Objection, which reflected the value of Debtor's property on July 22, 1987 as \$47,000.00. See Uniform Residential Appraisal Report (prepared by Appraiser Allen R. James, Jr.) (filed Nov. 29, 1988).

In correspondence to the Court, copies of which were provided to Debtor's counsel, the Trustee postures that he should not be time-barred from making his objection to the Debtor's claimed exemptions since "the statute applies only to my bringing an objection to claimed exemptions if the petition itself is correct." Letter from Randy J. Schaal, Esq. to Hon. Stephen D. Gerling) (Dec. 7, 1988). He further contends that, "[i]f the trustee has false information and it is as near in time as this matter has developed, I would argue that I have every right to bring the objection as I have done." Id.

DISCUSSION

The Trustee's Objection raises two issues, first was the objection filed timely by the Trustee and second, assuming the Trustee's information with regard to the value and character of the Debtor's real property is correct, can the Debtor exempt it from her creditors.

It is apparently the Trustee's contention that had the Debtor listed the true nature and value of the property in her Chapter 7 petition, he would have filed his objection within the thirty days required by Bankr.R. 4003(b). There is an inference that the Debtor purposely misled both the Trustee and her creditors as to the true nature and value of her real property, and that since the Trustee did not discover the Debtor's misrepresentations until after the thirty days permitted by Bankr.R. 4003(b), he should be permitted to file his objection late.

Debtor conversely argues that the Trustee is strictly bound by the thirty-day requirements of Bankr.R. 4003(b) and the fact that the property may have appreciated after her petition was filed, cannot inure to the Trustee's benefit since to hold otherwise would leave a debtor in limbo as to the intentions of a trustee with regard to the debtor's claimed exemptions and would ignore the well established rule of bankruptcy law that property is valued for exemption purposes on the date the petition is filed.

Neither Debtor's Response nor oral argument addressed the petition's reference to the character of the property as a one-

family residence, although Debtor's current counsel, Gustave J. DeTraglia, Esq., acknowledged that the property was a multiple dwelling attractive to investors, in an effort to explain its sudden post-petition appreciation. Nor has the Debtor in any way sought to amend her Schedule B-4 to assert an equity exemption in excess of \$6,000.00.

The time to file objections to claimed exemptions as set out in Bankr.R. 4003(b) is strictly construed and, by virtue of Bankr.R. 9006(b)(3), cannot be extended except as provided in Bankr.R. 4003(b), i.e. through a motion to extend the time made within the original thirty days. See In re Grossman, 80 B.R. 311 (Bankr. E.D.Pa. 1987).

Such a time limitation, however, cannot be utilized as a shield by a debtor who intentionally conceals the existence, nature or value of otherwise non-exempt assets from the trustee or his creditors. See In re Roberts, 81 B.R. 354 (Bankr. W.D.Pa. 1987).

Thus, while the Court must agree with Debtor's contention that the value of assets for exemption purposes must be fixed on the date of filing, see Code §522(a); In re Jones, 87 B.R. 738 (Bankr. M.D.Ga. 1988); In re Hager, 74 B.R. 198 (Bankr. N.D.N.Y. 1987), and that a trustee must object to the claimed exemptions within thirty days of the Code §341 meeting, the Court cannot agree that where the true nature and value of those assets claimed as exempt are intentionally misrepresented in debtor's petition and schedules, that a trustee is bound by the thirty-day requirement of Bankr.R. 4003(b) where he could not have reasonably discovered the misrepresentation within that time.

Unfortunately, the Court is unable to reach such a conclusion based upon the oral argument and documentary evidence presented by the parties herein.

It is apparent that the nature of Debtor's residence was misrepresented in the petition. It is also curious that although Debtor's real property was valued at \$50,000.00 in her petition, Debtor obtained a contract of sale, a little over a month later, for \$70,000.00. These factors alone, however, do not rise to the level of intentional misrepresentation.

It is equally unclear how and when the Trustee became aware of these discrepancies, and whether or not he can be charged with sufficient knowledge to have required him to act within thirty days of the Code §341 meeting.

An evidentiary hearing in this contested matter perhaps would have fleshed out what are only inferences at this point, but the parties chose to rest upon their papers.

The Court recognizes that the burden of proof is on the objecting party, the Trustee, herein, and while the Court may be inclined to agree with the Trustee that Debtor's equity in her real property is not fully exempt, the Trustee has not established "excusable neglect" nor provided any other equitable reason for his failure to file a timely objection. See Code §105(a); In re Feuerborn, 87 B.R. 173 (Bankr. D.Kan. 1988).

Thus, the Court must deny the Trustee's objection without prejudice since he has failed to establish circumstances which would release him from compliance with Bankr.R. 4003(b).

Pursuant to Code §522(1), the Court must allow the Debtor's

exemption, as claimed, to the extent of \$6,000.00 and directs that any remaining equity resulting from the sale of the property, presently pending, be paid over to or retained by the Trustee.

IT IS SO ORDERED.

Dated at Utica, New York

this day of February, 1989

STEPHEN D. GERLING
U.S. Bankruptcy Judge